

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

10 | EARL A. DANCY,

Case No: C 10-2602 SBA

Plaintiff,

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

vs.

13 AURORA LOAN SERVICES, LLC, and
DOES 1-20.

Docket No. 8

Defendants.

17 Plaintiff, Earl A. Dancy (“Plaintiff”), filed the instant action in Marin County
18 Superior Court alleging that Defendant, Aurora Loan Services, LLC (“Aurora”),
19 wrongfully foreclosed upon his home in Lagunitas, California. Aurora removed the action
20 to this Court on the basis of diversity jurisdiction. 28 U.S.C. §§ 1332, 1441. The parties
21 are presently before the Court on Aurora’s motion to dismiss, pursuant to Federal Rule of
22 Civil Procedure 12(b)(6). Dkt. 8. Having read and considered the record and the papers
23 submitted by the parties, the Court GRANTS the motion and dismisses the action with
24 leave to amend. Pursuant to Federal Rule of Civil Procedure 78(b) and Civil Local Rule 7-
25 1(b), the Court adjudicates the motion without oral argument.

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1 **I. BACKGROUND**

2 **A. FACTUAL SUMMARY**

3 Plaintiff is the former owner of a residence located at 200 Lagunitas Road,
 4 Lagunitas, California (“the Property”). Compl. ¶ 1, Dkt. 1. On August 15, 2005, the
 5 lender, American Sterling Bank, recorded a Deed of Trust against the Property as security
 6 for a mortgage in the amount of \$511,978. Def.’s Am. Request for Judicial Notice (“RJN”)
 7 Ex. 4 at 2, Dkt. 9. The Deed of Trust identifies First Trustee Services, Inc., as the
 8 “Trustee,” while Mortgage Electronic Registration Systems, Inc. (“MERS”) is specified as
 9 both the “nominee” of the Lender as well as the “beneficiary under this Security
 10 Instrument.” Id. The Deed of Trust provides that MERS has the right to foreclose on the
 11 mortgaged property:

12 Borrower understands and agrees that MERS holds only legal
 13 title to the interests granted by Borrower in this Security
 14 Instrument, but, if necessary to comply with law or custom,
 15 MERS (as nominee for Lender and Lender’s successors and
 16 assigns) has the right: to exercise any or all of those interests,
 17 including, but not limited to, *the right to foreclose and sell the*
 18 *Property*; and to take any action required of Lender including,
 19 but not limited to, releasing and canceling this Security
 20 Instrument.

21 Id. at 3 (emphasis added).

22 Plaintiff apparently fell behind on his mortgage payments, which resulted in a
 23 Notice of Default and Election to Sell under Deed of Trust (“NOD”) being issued. Id. Ex.
 24 2. The NOD, which was issued by Quality Loan Service Corporation (“Quality”), as the
 25 agent for MERS, states that MERS, as beneficiary of the Deed of Trust, “does hereby elect
 26 to cause the trust property to be sold to satisfy the obligations secured thereby.” RJN Ex. 2
 27 at 2. The NOD also provides that any inquiries should be directed to “Aurora Loan
 28 Services c/o Quality Loan Service Corp.” Id. at 2. On June 14, 2008, Quality recorded a
 29 Notice of Trustee’s Sale. Id. Ex. 3. On December 29, 2008, the trustee’s sale took place
 30 and the property was sold to Plaintiff. Id. Ex. 1.

31 Despite the foreclosure, Plaintiff refused to vacate the premises. Thus, on February
 32 9, 2009, Aurora filed an unlawful detainer action in Marin County Superior Court to evict

1 him from the subject property. Id. Ex. 6. The trial court ruled in favor of Aurora and
 2 ordered Plaintiff to turn over possession of the premises. Id. Ex. 7 at 1. Plaintiff
 3 unsuccessfully appealed that decision to the appellate division of the superior court. Id.
 4 Thereafter, Plaintiff sought to have the matter transferred to the California Court of Appeal,
 5 which denied his request on April 30, 2010. Id. Exs. 8, 9. On May 11, 2010, the trial court
 6 issued a writ of possession based on the judgment in the unlawful detainer action. Initially,
 7 the court stayed execution of the writ, but later vacated its stay on June 28, 2010. Id. Exs.
 8 10-12.

9 **B. PROCEDURAL HISTORY**

10 On May 12, 2010, the day after the state court issued a writ of possession, Plaintiff
 11 filed the instant lawsuit against Aurora in state court, claiming that the trustee's sale was
 12 improper. According to Plaintiff, MERS had no right to elect to proceed with a non-
 13 judicial trustee's sale of the subject property, ostensibly because MERS was not the
 14 beneficiary of the Deed of Trust and never owned the promissory note. See Compl. ¶ 5.
 15 No particular causes of action are alleged in the Complaint, though it appears that
 16 Plaintiff's claim is predicated on the theory of wrongful foreclosure.

17 On June 14, 2010, Aurora removed the action on the basis of diversity jurisdiction.
 18 Dkt. 1. On August 26, 2010, Plaintiff filed an ex parte motion for a temporary restraining
 19 order ("TRO"). In his motion, Plaintiff seeks an immediate injunction "prohibiting Aurora
 20 from evicting him before October 5, 2010 . . ." Pl.'s Mot. at 7. On September 2, 2010,
 21 the Court denied Plaintiff's motion on the ground that it lacked the legal authority to grant
 22 the relief requested. Dkt. No 27 at 5-6. The Court also found that Plaintiff had failed to
 23 demonstrate a likelihood of success on the merits. Id. at 6. Aurora now moves to dismiss
 24 the complaint pursuant to Rule 12(b)(6).

25 **II. LEGALSTANDARD**

26 Under Federal Rule of Civil Procedure 12(b)(6) a district court must dismiss a
 27 complaint if it fails to state a claim upon which relief may be granted. To survive a motion
 28 to dismiss for failure to state a claim, the plaintiff must allege "enough facts to state a claim

1 to relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570
 2 (2007). When considering a motion to dismiss under Rule 12(b)(6), a court must take the
 3 allegations as true and construe them in the light most favorable to plaintiff. In deciding a
 4 Rule 12(b)(6) motion, the court “may generally consider only allegations contained in the
 5 pleadings, exhibits attached to the complaint, and matters properly subject to judicial
 6 notice[.]” Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Leasehold
 7 and Easement in the Cloverly Subterranean, Geological Formation, 524 F.3d 1090,
 8 1096 (9th Cir. 2008). The court is to “accept all factual allegations in the complaint as true
 9 and construe the pleadings in the light most favorable to the nonmoving party.” Outdoor
 10 Media Group, Inc. v. City of Beaumont, 506 F.3d 895, 899-900 (9th Cir. 2007). If the
 11 complaint is dismissed, plaintiff generally should be afforded leave to amend unless it is
 12 clear the complaint cannot be saved by amendment. Sparling v. Daou, 411 F.3d 1006, 1013
 13 (9th Cir. 2005).

14 **III. DISCUSSION**

15 The Complaint does not allege any particular causes of action, but appears to be
 16 predicated on the notion of wrongful foreclosure under California Civil Code section
 17 2924(a). California Civil Code sections 2924 through 2941 govern non-judicial
 18 foreclosures initiated under a deed of trust. Gardner v. Am. Home Mortg. Serv., Inc., 691
 19 F. Supp. 2d 1192, 1102 (E.D. Cal. 2010). Under this statutory scheme, a non-judicial
 20 foreclosure may be initiated by a “trustee, mortgagee, or beneficiary, or any of their
 21 authorized agents” Cal. Civ.Code § 2924(a). The foreclosure process is commenced
 22 by the recording of a NOD. Id. § 2924(a)(1). The NOD must include the following:

- 23 (A) A statement identifying the mortgage or deed of trust by
 stating the name or names of the trustor or trustors and giving
 the book and page, or instrument number, if applicable, where
 the mortgage or deed of trust is recorded or a description of the
 mortgaged or trust property.
- 24 (B) A statement that a breach of the obligation for which the
 mortgage or transfer in trust is security has occurred.
- 25 (C) A statement setting forth the nature of each breach *actually*
 known to the beneficiary and of his or her election to sell or
 cause to be sold the property to satisfy that obligation and any

1 other obligation secured by the deed of trust or mortgage that is
 2 in default.

3 (D) If the default is curable pursuant to Section 2924c, the
 4 statement specified in paragraph (1) of subdivision (b) of
 5 Section 2924c.

6 Id. (emphasis added). If the default is not cured within three months of the notice of
 7 default, a notice of sale may be given which states the time and place of the sale. Id.
 8 § 2924(a)(3). A “person authorized to record the notice of default or the notice of sale”
 9 includes “an agent for the mortgagee or beneficiary, an agent of the named trustee, any
 10 person designated in an executed substitution of trustee, or an agent of that substituted
 11 trustee.” Id. § 2924b(b)(4).

12 Here, Plaintiff seizes upon the reference in section 2924(a)(1)(C) to “the beneficiary
 13 and of *his or her election to sell*” and claims that such language establishes that *only* the
 14 actual beneficiary has the right to invoke the election to sell. Pl.’s Opp’n at 7-8. Plaintiff
 15 posits that because Aurora was not the foreclosing beneficiary, it had no right to initiate
 16 foreclosure proceedings. Id.¹ This contention lacks merit. The foregoing provision must
 17 be construed in tandem with section 2924(a), which expressly provides that a non-judicial
 18 foreclosure may be commenced by a “trustee, mortgagee, or beneficiary, or any of their
 19 authorized agents.” Cal. Civ.Code § 2924(a). As for section 2924(a)(1)(C), it merely
 20 requires that the NOD include a statement that the beneficiary is electing to exercise its
 21 right to sell the property.

22 As discussed above as well as in the Court’s order denying Plaintiff’s application for
 23 a TRO, *the Deed of Trust specifically identifies MERS as a beneficiary and confers upon*
 24 *MERS the right to foreclose upon and elect to sell the Property.* RJN Ex. 4 at 2-3; Dkt. 27
 25 at 6. Consistent with section 2924(a)(1)(C), the NOD recorded against the Property
 26 specifies that MERS, *as beneficiary of the Deed of Trust*, “does hereby elect to cause the
 27 trust property to be sold to satisfy the obligations secured thereby.” RJN Ex. 2 at 2.
 28 Although MERS did not itself issue the NOD, it did so through its substitute trustee,

¹ The Complaint alleges that Aurora “caused” the NOD to be issued, though the NOD itself was generated and recorded by Quality Loan Service, Inc. Compl. ¶ 8.

1 Quality, which is permitted under Civil Code § 2924b(b)(4). RJN Exs. 2 and 5. Plaintiff
 2 has not cited any legal authority to establish that in California the foreclosure must be
 3 initiated by the lender or beneficiary itself.

4 Next, Plaintiff asserts, without citation to any legal authority, that “MERS was not a
 5 true beneficiary under the Deed of Trust because it never owned, held, or had any other
 6 interest in the Note, and it was not entitled to payment under the Note.” Pl.’s Opp’n at 13.
 7 This contention lacks merit. As the Court explained in its prior ruling, Dkt. 27 at 6, the
 8 Deed of Trust expressly designates that MERS “is acting solely as nominee for Lender *and*
 9 *Lender’s successors and assigns . . . [and]* MERS is the beneficiary under this Security
 10 Instrument,” RJN Ex. 5 at 2. Thus, whether or not MERS owned the note or was entitled
 11 to any payments thereunder does not obviate the fact that the Deed of Trust designated
 12 MERS as a beneficiary, which, under section 2924(a), has the right to foreclose.

13 Finally, Plaintiff argues that MERS could not have been the beneficiary under the
 14 Deed of Trust at the time of the foreclosure because the mortgage was sold “at some point
 15 after 2005.” Pl.’s Opp’n at 14. Assuming arguendo that original lender, American Sterling
 16 Bank, had sold the mortgage as of the date of the trustee’s sale, the fact remains that MERS
 17 continued to be new mortgage owner’s nominee and beneficiary under the Deed of Trust.
 18 As such, MERS retained the power to appoint Quality as its substitute trustee. See Cal.
 19 Civ. Code § 2924b(b)(4); Lane v. Vitek Real Estate Indus. Group, -- F. Supp. 2d --, 2010
 20 WL 1956707, at *5 (E.D. Cal. May 13, 2010) (rejecting argument that MERS lost its power
 21 of sale after the mortgage was sold on the secondary market).²

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28 ² In view of the foregoing, it is unnecessary to reach the issue of tender.

1 **IV. CONCLUSION**

2 For the reasons stated above,

3 IT IS HEREBY ORDERED THAT:

4 1. Defendant's motion to dismiss is GRANTED.

5 2. Plaintiff shall have seven (7) days from the date this Order is filed to file an
6 amended complaint, consistent with the Court's rulings, as set forth above. In the event
7 Plaintiff fails to file an amended complaint within that time-frame, the dismissal of the
8 action will be deemed to be with prejudice.

9 3. Should the parties file any additional noticed motions in this action under
10 Civil Local Rule 7-2, the moving and opposition papers shall be limited to fifteen pages and
11 reply briefs shall be limited to the pages.

12 4. The parties shall appear for a telephonic Case Management Conference on
13 January 19, 2011 at 3:00 p.m. The parties shall meet and confer prior to the conference
14 and shall prepare a joint Case Management Conference Statement, which shall be filed no
15 later than ten (10) days prior to the Case Management Conference. The statement shall
16 comply with the Standing Order for All Judges of the Northern District of California and
17 the Standing Order of this Court. Plaintiff shall be responsible for filing the statement as
18 well as for arranging the conference call. All parties shall be on the line and shall call (510)
19 637-3559 at the above indicated date and time.

20 IT IS SO ORDERED.

21 Dated: November 1, 2010



SAUNDRA BROWN ARMSTRONG
United States District Judge